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SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 761

LEE MODE ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

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PARAGON PRINTING CO., LITTLE ROCK

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OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at Ark. ; 350 S.W. 2d 675.

JURISDICTION

The petitioner has failed to show that he properly raised the federal question. He must follow the state procedure in raising the question. The procedure in Arkansas requires that the constitutional question be raised in the trial court and if it is not the Court will not consider it for the first time on appeal. *Latham v. Hudson*, 226

Ark. 673; 292 S.W. 2d 252. Thus when required by state practice, the federal question must be raised before the trial court. And it must be presented to the trial court at the point considered appropriate under state procedure. See *Hulbert v. Chicago*, 202 U.S. 275 (complete failure to raise question at trial court level); *Brown v. Massachusetts*, 144 U.S. 573, 580 (Failure to raise question before verdict held to be fatal); *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 234-5 (proper to raise question in motion for new trial).

The petitioner here raised the federal question for the first time in a petition for rehearing (R.109). Raising the federal question for the first time in a petition for rehearing addressed to the highest state court is generally insufficient unless the court actually entertains the petition and expressly decides the question. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128; *Herndon v. Georgia*, 295 U.S. 441, 443; *American Surety Co. v. Baldwin*, 287 U.S. 156; *Forbes v. State Council*, 216 U.S. 396; *Zimmerman v. Nebraska*, 116 U.S. 54. To constitute a reviewable judgment under such circumstances, the order denying the petition for rehearing must be more than a cursory recitation that the petition has been fully or maturely considered and accordingly is denied. *Consolidated Turnpike Co. v. Norfolk & O.V. R. Co.*, 228 U.S. 326, 333-4; *Forbes v. State Council*, *supra*, 399; *McGirl dale v. Texas*, 211 U.S. 432, 436-7. It is submitted that the entry of certification (R.112) is not sufficient to raise the federal question.

QUESTION PRESENTED

Whether there was a denial of due process of law under the Fourteenth Amendment of the Federal Constitution by the refusal of the Supreme Court of Arkansas to consider on appeal assignments of error that were disposed of on the first appeal.

STATEMENT

The question presented here was raised for the first time on a petition for rehearing.

The petitioner was charged by information October 13, 1965, with the crime of first degree murder. His first trial was held March 24, 1966, with the jury returning a verdict of second degree murder and fixing his punishment at 21 years in the state penitentiary. On appeal the Supreme Court of Arkansas reversed because of an erroneous instruction. *Mosby v. State*, 231 Ark. 477, 330 S.W. 2d 88. The second trial of this cause was held October 24, 25, and 26, 1966. Again the petitioner was found guilty of second degree murder and his punishment fixed at 21 years in the penitentiary.

The facts are briefly as follows: On October 13, 1965, at about 10:30 a.m., the victim D. L. Russell was walking west on Vauroukle Street in Conway, Arkansas, when the petitioner suddenly stepped from the doorway of the Farmers Supply Store with a pistol in his hand. Russell grabbed the petitioner's right arm in an apparent attempt to push the gun away, slipped from the curb with the petitioner firing two shots at him. One of the shots struck Russell in the left ear and entered his brain, thereby causing his death.

The evidence was abundant that the petitioner was having an illicit affair with Russell's wife. The Russell children testified that Petitioner would come to their home, in their father's absence, and give them money to leave his and their mother's presence with the excuse of having them count the cattle or check the depth of the stock pond. Cecil Barnett, Russell's stepfather, while working at the Russell's residence, which was owned by petitioner, entered the house and saw Mrs. Russell in petitioner's presence wearing only pants and a brassiere. After the reversal of the case petitioner moved to Oklahoma with Russell's widow and held her out as his wife.

ARGUMENT

The petitioner's sole argument is that he was denied due process of law since the Supreme Court of Arkansas refused to consider on the second appeal assignments or error which were raised in the first appeal under the rule of the "Law of the Case".

It suffices to say that decisions by appellate courts becomes the law of the case on the second trial. *Marron v. U.S.*, 18 F 2d 218, certiorari granted 274 U.S. 727, affirmed 275 U.S. 192, motion denied 48 S. Ct. 206, 72 L. Ed. 1016.

Hence the petitioner's argument is devoid of merit.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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May 14, 1962